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[Survey of Release of Mailing Lists by Federal Government Agencies]. LCD-77-112; B-169272. August 25, 1977. 8 pp.

Report to Rep. Charles A. Vanik; by Robert F. Keller, Acting Comptroller General.

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Organization Concerned: Department of the Treasury; Department of Commerce; Department of Defense; Department of Health, Education, and Welfare; Department of Justice; Department of Transportation; General Services Administration; Nuclear Regulatory Commission; Postal Service; Veterans Administration.

Congressional Relevance: Rep. Charles A. Vanik.

Authority: Freedom of Information Act (5 U.S.C. 552). Privacy Act of 1974 (5 U.S.C. 552a). 40 Fed. Reg. 28951. 27 C.F.R. 240.540 et seq. Getman v. National Labor Relations Board, 450 F.2d 670 (D.C. Cir. 1971). Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1973). Department of the Air Force v. Rose, 425 U.S. 352 (1976).

A review of the policies and practices of 11 Federal departments, agencies, or commissions on releasing mailing lists outside the Government showed that the agencies were generally aware of the personal privacy issue as it related to the release of mailing lists and that they have addressed it in their policies. Findings/Conclusions: Many inconsistencies exist in the present policies on mailing lists. Court decisions do not provide any definitive guidelines to agencies, and the distinctions made in the law are not sufficiently clear to allow satisfactory answers to all questions that arise. Generally, lists of business names and addresses are releasable under the Freedom of Information Act. The rules governing the release of individual names and addresses are not as clear. In addition, the Privacy Act serves to limit the release of individual nonbusiness names and addresses. Mailing lists containing addresses of both businesses and individuals present difficult definitional problems. If the activity giving rise to the mailing list is substantially personal and not directly business oriented, then release of the list, even though it contains addresses of both businesses and individuals, may be questionable. Because considerable discretion must be exercised in these matters, an agency's decision on releasing such a mixed list should be accepted if no proof exists showing arbitrary disregard of the evidence by the agency. (SC)



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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03158
The Honorable Charles A. Vanik
House of Representatives

Dear Mr. Vanik:

Your letter of December 6, 1976, requested that we survey the extent that Federal Government officials are releasing names and addresses to "junk mailers" or other commercial operations. You expressed concern that Federal officials may unintentionally be violating the invasion of privacy exemptions of the Freedom of Information Act. In a meeting with your office on February 4, 1977, we agreed to review the policies and general practices regarding release of mailing lists at about 10 Federal agencies.

BACKGROUND

The Freedom of Information Act (5 U.S.C. 552) requires that Federal agencies release certain agency information. Agencies, however, are not required to release personnel, medical, or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Privacy Act of 1974 (5 U.S.C. 552a) was to provide safeguards for an individual against an invasion of personal privacy by the Federal Government. Subsection (n) of 5 U.S.C. 552a states that an individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. Subsection (n) goes on to provide: "This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public."

On July 9, 1975, the Office of Management and Budget issued guidelines to executive agencies for implementing the Privacy Act. These guidelines specifically cite the restrictions on release of mailing lists as stated in the law. An Office of Management and Budget official advised us that, in deciding whether to release mailing lists, executive agencies should also be guided by all applicable legislation and their own judgment based on the particular circumstances.

SCOPE

We contacted officials in 11 Federal departments, agencies, or commissions (hereafter all will be referred to as agencies) to review and discuss their policies and practices on releasing

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mailing lists outside the Government. Where policies permitted the release of names and addresses, we attempted to identify any inconsistencies between stated policy and actual practice. In addition, we reviewed applicable laws and court cases dealing with the release of Government mailing lists.

POLICIES AND PRACTICES

Policies and practices at the 11 agencies varied in terms of release of names and addresses outside the Government. The Department of Defense will release individual names and addresses only with the individual's consent. The United States Postal Service and the Department of the Treasury prohibit the release of names and addresses outside the Government.

The Departments of Commerce and Health, Education, and Welfare (HEW) have policies which generally prohibit the release of names and addresses. However, according to responsible officials, when mailing lists contain addresses of both businesses and individuals, release is permitted on the assumption that individuals listed are acting in a business capacity. Examples of this type of mailing list include the Department of Commerce's "Commerce Business Daily" and HEW's mailing lists for dissemination of studies, research papers, theses, and projects on human services.

Generally, lists of business names and addresses are releasable under the Freedom of Information Act. The rules governing release of individual names and addresses are not as clear since the applicable statutes are not explicit and the three court cases involving such release--discussed later in this report--leave room for uncertainty. Typically, we would expect more of a basis under the Freedom of Information Act to withhold names and addresses of individuals than for businesses; and that some courts, in reviewing such a withholding, would weigh the public interest in releasing the information against what would otherwise be a "clearly unwarranted invasion of personal privacy" (exemption 6 of the Freedom of Information Act). In addition, the Privacy Act also serves to limit the release of individual nonbusiness names and addresses.

Mailing lists containing addresses of both businesses and individuals present difficult definitional problems. While an address may seem clearly a business or a home address, it is nevertheless not clear what constitutes either.

For example, mere examination of an address does not permit the determination that the individual using it is acting in a personal rather than a business capacity.

In light of these problems and the different laws involved, we cannot reach an abstract legal conclusion. We do think that if the activity giving rise to the mailing list is substantially personal and not directly business oriented, then release of the list, even though it contains addresses of both businesses and individuals, may be questionable. Because considerable discretion must be exercised in these matters, we think that an agency's decision on releasing such a mixed list should be accepted if no proof exists showing arbitrary disregard of the evidence by the agency.

Four of the agencies contacted--Federal Communications Commission, Federal Aviation Administration, Nuclear Regulatory Commission, and General Services Administration--maintain information files they consider to be public documents. These files also include the names and addresses of individuals. For example, the Federal Communications Commission stated that their license applications are public documents. Federal Communication Commission officials stated that the largest single category is Citizens Band radio licenses which currently total about nine million. The Federal Communications Commission has arranged with the National Technical Information Service (an agency of the Department of Commerce) to distribute these lists upon request. The National Technical Information Service sells the lists to requestors on a cost-recovery basis.

The Federal Aviation Administration maintains information on pilots, engineers, navigators, and control tower operators. This is just one of several systems of records maintained by the Federal Aviation Administration. Agency officials said that lists are prepared and used primarily to make available the names of parties licensed to perform certain functions; this availability increases accessibility to Federal Aviation Administration-approved services. In addition, aviation associations, foundations, and manufacturers often use these lists to disseminate aviation safety information or to make analytical studies of market demand. For instance, a private pilots association uses the lists to notify pilots when their medical certificates are about to expire.

The Nuclear Regulatory Commission also considers its license applications and applicable correspondence to be public documents. This information is available in the Nuclear Regulatory Commission's public documents room where anyone may prepare a list from the records file.

Officials of the three agencies--the Federal Communications Commission, the Federal Aviation Administration, and the Nuclear Regulatory Commission--stated that they do not provide their information in a mailing list format, but the recipients of this information may very well manipulate this data to formulate mailing lists for their purposes.

It is not always clear whether a license is for business or for personal use. A Citizens Band radio license, for example, may be obtained for either purpose. If the agency with licensing responsibility concludes that licenses are for business purposes, or that release of licensee names and addresses does not constitute a clearly unwarranted invasion of personal privacy, then release is proper unless the courts determine otherwise.

If an agency decides that a mailing list is releasable, then any reasonable method for making the list available to the public should be acceptable. Thus, the arrangement the Federal Communications Commission has made with the National Technical Information Service to distribute the mailing list of Citizens Band license holders is not objectionable.

The General Services Administration maintains bidders lists through which the agency notifies interested persons of the public auction of Federal property. These bidders lists are considered by the General Services Administration to be public information and, therefore, are made available upon request. A General Services Administration official estimated that the agency has hundreds of bidders lists.

Those who offer to provide the Government with goods or services are unlikely to have a privacy interest that can be protected under either the Freedom of Information Act or the Privacy Act, since the protection of both laws is for personal individual privacy. The Freedom of Information Act requires disclosure of Government information about individuals unless such disclosure would be a "clearly unwarranted invasion of personal privacy" (exemption 6).

Privacy Act protection extends only to personal information about individuals. Indeed, businesses may well have no personal privacy interest at all, since privacy is generally considered to be a concern of individuals. And the Privacy Act does not apply to entrepreneurs, according to the interpretation provided in the Office of Management and Budget guidelines (40 F.R. 28951, July 9, 1975).

Where a bidders list consists of those who wish to purchase property from the Government, the presumption of entrepreneurial activity does not attach so easily. The sale of Carson City silver dollars, which was generally designed to make the dollars available to individuals, is a good example. Although the sale involved bids by prospective purchasers, the auction's purpose was to allocate the limited number of silver dollars to individuals. The General Services Administration, which ran the silver dollar sale, considers its list of bidders to be releasable. However, the Bureau of the Mint, which also sells coins, views the release of its mailing list as an unwarranted invasion of personal privacy.

While a sale of silver dollars may more easily be characterized as being aimed at individuals, it is not so easy to state that a sale of used chairs, or electrical generating equipment, is aimed at individuals rather than businesses. Given the difficulties of this situation and the uncertainties of the law, we cannot state categorically when, if ever, the release of a bidders list should be considered improper.

The Veterans Administration and the Drug Enforcement Administration are authorized by law to release individual names and addresses in specific circumstances. For instance, the Drug Enforcement Administration maintains a list of registered controlled substance handlers which may be released to State or local regulatory boards. The Veterans Administration is authorized to release the names and addresses of veterans and/or their dependents to Veterans Administration-recognized nonprofit organizations which provide veterans benefits.

Court cases involving release of names and addresses

There are several court cases involving the release of names and addresses under the Freedom of Information Act. Those cases were decided before the effective date of the

Privacy Act, and are not especially illuminating. They serve, however, to indicate the considerable complexity in determining whether mailing lists are releasable.

The first case to be decided was Getman v. National Labor Relations Board (450 F.2d 670 (D.C. Cir. 1971)), in which the court ordered release of the names and addresses of employees eligible to vote in National Labor Relations Board elections. In balancing the public interest in disclosure against the privacy rights of the employees, the court felt the reason the requestor sought the names was worthwhile, and concluded that release would not be a clearly unwarranted invasion of personal privacy--the justification for nondisclosure under exemption 6, Freedom of Information Act.

Another case is Robles v. Environmental Protection Agency (484 F.2d 843 (4th Cir. 1973)). Here, the court permitted the disclosure of names and addresses of people living in homes built on uranium tailings. The Environmental Protection Agency had already made disclosure to the Colorado Department of Health; that Department had disclosed to the local Community Development Director, who would disclose to any proper party about any specific structure. The case has such unusual facts that it is difficult to use it, particularly since the court's reasoning in support of release is disjointed and since it disagreed with the Getman court on the need, in determining a clearly unwarranted invasion of personal privacy under exemption 6, to balance the public interest in disclosure against the personal right to privacy. The Robles court clearly implies that the requestor's purpose is irrelevant, but permitted disclosure because names and addresses were no longer controllable due to their release to the State of Colorado.

A third and probably most comprehensive case on mailing lists is Wine Hobby USA, Inc. v. United States Internal Revenue Service (502 F.2d 133 (3d Cir. 1974)), which prohibited release of the names and addresses of amateur winemakers who filed form 1541 with the Bureau of Alcohol, Tobacco, and Firearms to obtain a tax exemption. This case can be distinguished from one involving licenses since form 1541 seeks an exemption from a tax, not a license to make wine, and since the activity was clearly personal. Wine could be exempt from tax only when made by the family head for personal use. (See 27 C.F.R. 240.540 et seq. (1976).)

The Wine Hobby court balanced the public interest against the privacy right, citing the Getman case with approval, and concluded that disclosure would be a clearly unwarranted invasion of personal privacy. In so holding, the court disagreed with the Robles court's view that the requestor's purpose is irrelevant and that the Freedom of Information Act precludes balancing the public interest in disclosure against the privacy interest. The Wine Hobby court, like the court deciding the Getman case, was heavily influenced by the purpose of the requestor--here a private commercial purpose.

In Department of the Air Force v. Rose (425 U.S. 352 (1976)), a Freedom of Information Act exemption 6 case involving, not mailing lists, but case summaries of certain Air Force Academy hearings, the Supreme Court cited Wine Hobby and Getman for the proposition that exemption 6 requires balancing the public interest in disclosure against the privacy right and ordered the District Court to inspect the case summaries in camera and delete personal identifying information so they could be disclosed. The Supreme Court described this process as "a workable compromise between individual rights and the preservation of public rights to Government information," the "statutory goal of exemption 6."

From these cases, it can be seen that if one balances the public interest in disclosure against the privacy interest, the requestor's purpose can influence whether the exemption for clearly unwarranted invasion of personal privacy applies. None of the cases, however, addresses the fact that where disclosure is made to a requestor because of the paramount public interest, the requestor is under no legal constraint against further disclosure. That being so, and especially because the standards on disclosure are so unclear, it is especially difficult to decide whether agencies' actions regarding mailing lists were proper.

CONCLUSIONS

The agencies surveyed were generally aware of the personal privacy issue as it related to the release of mailing lists and have addressed it in their policies. It should be clear from this discussion that many inconsistencies exist in the present policies on mailing lists. Court decisions do not provide any definitive guidelines to agencies, and the distinctions made in the law are not sufficiently clear to allow satisfactory answers to all questions that

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arise. We believe that these factors help explain why agency policy is so inconsistent.

As you requested, the agencies contacted were not provided with a draft of this report for their formal comments. In accordance with discussions with your office subsequent to your receipt of the report copies will be sent to the Senate Subcommittee on Administrative Practice and Procedure; the House Subcommittee on Government Information and Individual Rights; the Director, Office of Management and Budget; and the agencies included in the review.

Sincerely yours,



Acting Comptroller General
of the United States